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No. 89-1975

In the Supreme Court of the United States

OCTOBER TERM, 1989

MILTON JUISTER,
PETITIONER,

-v-

BECHTEL POWER CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BECHTEL POWER CORPORATION IN OPPOSITION TO PETITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

A. Did the Sixth Circuit apply the correct standard when it reviewed a district court's denial of Rule 11 sanctions only for abuse of discretion?

B. Did the district court and the Sixth Circuit apply the correct criteria for determining whether a Rule 11 violation occurred?

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF THIS RESPONDENT

Bechtel Power Corporation is a wholly-owned subsidiary of Bechtel Group, Inc., a privately-held corporation.

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Respondent, Bechtel Power Corporation (hereinafter "Bechtel"), responding in opposition to Milton Juister's Petition for Writ of Certiorari, respectfully requests that this Court decline review of the Order of the United States Court of Appeals for the Sixth Circuit affirming the district court's denial of Petitioner's motion for Rule 11 sanctions.

COUNTER-STATEMENT OF THE CASE

On December 30, 1987, Petitioner sued in Michigan's Seventh District Court to recover sick leave benefits from his employer, Bechtel. On February 8, 1988, Bechtel timely removed the matter to federal court on the basis of federal question jurisdiction arising from ERISA preemption. United States District Judge Richard A. Enslen agreed that federal question jurisdiction ex-

isted because ERISA preempted Petitioner's claim, and in addressing the merits, granted summary judgment in Bechtel's favor.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. In an Order dated February 1, 1989, the Sixth Circuit found no federal jurisdiction and vacated the district court's decision, with instructions to remand the case. Petitioner then sought Rule 11 sanctions in the district court, claiming that Bechtel had no basis for removal. Judge Enslen denied the motion for sanctions, and the Sixth Circuit affirmed the denial on January 22, 1990. Petitioner's motion for rehearing *en banc* was denied in an Order entered on March 19, 1990. Petitioner now seeks review in this Court.

SUMMARY OF ARGUMENT

Petitioner has demonstrated no reason to grant a writ of certiorari. He has not shown that the decision of the United States Court of Appeals for the Sixth Circuit conflicts with the decision of any other circuit. Nor has he shown that the courts below departed from accepted judicial practice.

Petitioner argues that the Sixth Circuit should not have reviewed the district court's denial of Rule 11 sanctions only for abuse of discretion. However, this Court recently directed circuit courts to apply precisely this standard of review. In *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763, 4769 (June 11, 1990), this Court stated, "... an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." Therefore, the Sixth Circuit applied the correct standard of review in this case.

Petitioner has also failed to show that the district court erred in deciding whether Respondent violated Rule 11. While Petitioner claims that the district judge had a duty to set forth specific findings of fact and conclusions of law in his Order denying Rule 11 sanctions, he has cited no authority supporting this proposition. In fact, the case law Petitioner does cite supports the conclusion

that Judge Enslen was not required to make specific findings, since the basis of his decision was clear from the record. Similarly, Petitioner has failed to show that Judge Enslen relied on Respondent's good faith in reaching his decision. The district judge clearly applied the correct "reasonableness under the circumstances test" in denying Rule 11 sanctions.

Neither has Petitioner shown that the Sixth Circuit employed incorrect Rule 11 criteria. The Sixth Circuit's Order explicitly relies on the proper Rule 11 test: whether Respondent's removal was reasonable under the circumstances. Finally, the Sixth Circuit correctly allocated the burden of proof. Petitioner is merely dissatisfied with the denial of his Rule 11 motion, and the affirmance of that denial on appeal. He has given this Court no reason to grant his petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

The United States Court Of Appeals For The Sixth Circuit Correctly Reviewed The District Court's Denial Of Rule 11 Sanctions Only For Abuse Of Discretion, As Required By This Court In *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763 (June 11, 1990)

While Petitioner correctly states that the Sixth Circuit applied an abuse of discretion standard when it reviewed the district judge's denial of Rule 11 sanctions, his objection to this standard is now moot in light of this Court's decision in *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763 (June 11, 1990).

The Sixth Circuit's Order states in part: "The test for imposition of Rule 11 sanctions is whether the conduct in question was reasonable under the circumstances. (Citations omitted). We review the district court's determination of reasonableness only for abuse of discretion." Petitioner, Milton H. Juister's *Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*, at *Appendix* p. 3. Although

Petitioner claims that the Sixth Circuit should have used a more rigorous standard of review, this Court has ruled otherwise.

This Court recently addressed the proper standard of review to be used when considering Rule 11 decisions, in *Cooter & Gell supra*. There the Court stated that, ". . . an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." 58 U.S.L.W. at 4769. The decision in *Cooter & Gell* affirms that the Sixth Circuit correctly reviewed the district court's denial of Rule 11 sanctions only for abuse of discretion. Consequently, Petitioner's argument has no merit.

II.

The District Court And Circuit Court Applied The Correct Criteria For Determining Whether A Rule 11 Violation Occurred

In addition to challenging the Sixth Circuit's standard of review, Petitioner alleges assorted errors in the courts' Rule 11 determination.

A. The district court was not required to set forth specific findings of fact and conclusions of law

Petitioner argues that Judge Enslen had a duty to set forth specific findings of fact and conclusions of law in his Order denying sanctions, and that the Judge breached this duty, citing *Foval v. First National Bank of Commerce in New Orleans*, 841 F.2d 126, 130 (5th Cir. 1988). *Foval* states:

> Fifth, a district court *need not* support its Rule 11 decision with specific findings of fact and conclusions of law in all cases. If, however, the justification underlying the decision is *not readily apparent* from the record, a prompt remand for such findings and conclusions will be made.

Id. (citation omitted and emphasis added). Petitioner's quotation of only the second of these two sentences is misleading.

Based on the case Petitioner cites, Judge Enslen was not required to include specific findings and conclusions, since the justification *was* readily apparent from the record. The district judge held that Respondent's removal was reasonable under the circumstances since the record shows he had *agreed* that federal jurisdiction existed. A less selective reading of Petitioner's own authority compels the conclusion that Judge Enslen's conduct was not "lax". Thus, Petitioner's claim that the district judge's Order was insufficient, has no merit.

B. The district court properly relied on Respondent's objective good faith

In discussing Judge Enslen's purported duty to set forth specific findings, Petitioner also quotes *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253 (2nd Cir. 1985), *cert. denied* 484 U.S. 918 (1987): "Simply put, subjective good faith no longer provides the safe harbor it once did." This excerpt is irrelevant to Juister's argument that Judge Enslen breached his duty to scrutinize the reasonableness of Bechtel's actions and to include his investigation results in the court record. At most, Petitioner erroneously implies that Judge Enslen denied Rule 11 sanctions because Bechtel acted in subjective good faith. However, Judge Enslen clearly based his decision on the proper objective standard of reasonableness under the circumstances.

Subjective good faith is not a defense to a Rule 11 allegation. Rather, "The conduct of counsel that is the subject of sanctions must be measured by an objective standard of reasonableness under the circumstances . . . . (citations omitted)" *Century Products, Inc. v. Sutter*, 837 F.2d 247, 251 (6th Cir. 1988). Judge Enslen's Order states in part: "Rule 11 does not require the parties' arguments or legal theories be correct, but only that they be asserted in good faith, after reasonable inquiry into the facts and the law. *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986)." (*Pet. App.* p. 4). Judge Enslen observed that Bechtel believed in good faith that Petitioner's claim presented a federal question.

Petitioner ignores the distinction between subjective good faith, which was the previous Rule 11 standard, and objective good faith, which is comprehended by the current standard of reasonableness under the circumstances. Prior to its 1983 amendment, Rule 11 required subjective bad faith to warrant the imposition of sanctions. *Zaldivar v. City of Los Angeles*, *supra* at 829. The 1983 amendment intentionally replaced the subjective focus with an objective one. *Id.* The Sixth Circuit has agreed that the current test is an objective one of reasonableness under the circumstances. *See, e.g., Century Products, supra.*

Rule 11 does not require a pleader to be correct in his or her view of the law. *Id.* at 830. Rather, the pleader must have a good faith argument, based on objective standards, for his or her view of what the law is, or should be. *Id.* at 831. "A good faith belief in the merit of a legal argument is an *objective condition* which a competent attorney attains only after 'reasonable inquiry'." *Id.*

In reversing an imposition of sanctions upon an attorney for having filed a complaint, the Ninth Circuit emphasized in *Zaldivar* that its only concern was whether the complaint asserted a good faith argument, even if that legal argument ultimately failed. *Id.* at 832. It concluded that a competent attorney could have made the plaintiff's argument in good faith, after a reasonable inquiry.

Judge Enslen cited *Zaldivar* to support his statement that Rule 11 requires legal theories to be asserted in good faith. He did not rely on the supplanted subjective good faith test. The Judge clearly relied on Bechtel's objective good faith, an element of the current reasonableness test. Accordingly, Petitioner's arguments on this issue are without support, so that this Court need not review the district court's Order, or the affirmance of that Order.

C. The circuit court relied on the correct Rule 11 test

Petitioner also argues that on review, the Sixth Circuit imposed an incorrect test, in conflict with decisions by other circuits, to determine whether Respondent violated Rule 11. The Sixth Circuit's Order explicitly states, "The test for imposition of

Rule 11 sanctions is whether the conduct in question was reasonable under the circumstances (citations omitted)." (*Pet App.* p. 3.) This test is not only correct, but entirely consistent with that used in other circuits. *See, e.g., Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 873 (5th Cir. 1988); *Zaldivar supra* at 829; and *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

D. The circuit court correctly allocated the burden of proof

Finally, Petitioner claims that, in ruling on his appeal, the Sixth Circuit misallocated the burden of proof. Petitioner syllogistically argues that Rule 11 imposes an affirmative duty on attorneys. He asserts that the burden of proof generally rests on the party with the affirmative of an issue, according to 31 A *C.J.S.* Evidence §104. Therefore, he concludes that because Respondent had an affirmative duty to comply with Rule 11, it also had the burden to prove that its actions complied with Rule 11.

Petitioner's secondary premise is flawed. As the moving party, he had the "affirmative" of his allegation that Respondent violated Rule 11, as confirmed in *Harris v. Marsh*, 679 F. Supp. 1204, 1314 (E.D.N.C. 1987). In *Harris*, plaintiff sued her employer for race discrimination. The defendant sought Rule 11 sanctions, arguing that plaintiff had abandoned some of her claims in bad faith and that the claims were meritless and frivolous when filed. The court responded:

> Contrary to the defendant's argument, the burden of proof on both of these issues [bad faith abandonment and frivolous filing] lies with the defendant. Unless proven otherwise, this court presumes counsel for plaintiff file and prosecute claims in good faith, with a reasonable basis in law and fact.

Id. at 314, fn. 172. As in *Harris*, the party moving for Rule 11 sanctions had the burden to prove a Rule 11 violation occurred. The circuit court properly assumed that Juister had the burden of proof in his motion for sanctions.

Petitioner also claims that the Sixth Circuit imposed a greater burden of proof than case law sets forth, because it required him to provide "conclusive proof" that Respondent knowingly violated Rule 11. This is not true.

In his *Motion for Imposition of Sanctions* addressed to Judge Enslen, dated March 6, 1989, at page 2, Petitioner argued that a July 13, 1988 letter from Bechtel to the U.S. Department of Labor provided "clear evidence" that Bechtel "knew" it had no basis for removal. In his brief appealing Judge Enslen's denial of sanctions, Petitioner again referred to the letter, arguing that Bechtel had long known ERISA did not apply, and that Bechtel acted fraudulently. *Pro Se Appellant's Brief*, dated May 15, 1989 at p. 3.

The Sixth Circuit's Order merely responded to Petitioner's argument that Bechtel's letter constituted clear proof of a knowing Rule 11 violation. The Sixth Circuit's Order explains:

> Here, it is difficult to conclude that defendant's petition was unreasonable in light of the initial success of the petition. Further, the letter which plaintiff contends shows that the petition was filed in bad faith is certainly far from *conclusive proof* that defendant or counsel for defendant *knew* that the petition lacked basis. Simply put, we cannot conclude that the district court abused its discretion on the basis of the record before us.

(*Pet. App.* p. 3) (emphasis added). The second sentence in this paragraph does not indicate that the Sixth Circuit required Petitioner to present conclusive proof. The Sixth Circuit only *responded* to Petitioner's argument that the letter conclusively proved Bechtel knew it had no basis for removal. Consequently, Petitioner's argument on this issue likewise lacks merit, and does not provide support for this Court's review.

CONCLUSION

For the foregoing reasons, Respondent, Bechtel Power Corporation, respectfully requests that the Court deny Milton H. Juister's Petition for a Writ of Certiorari.

Respectfully submitted

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